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Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of	
Billed Party Preference for InterLATA 0+ Calls	**CC Docket No. 92-77**

COMMENTS OF AMERICAN NETWORK EXCHANGE, INC.

American Network Exchange, Inc. ("AMNEX"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby comments on the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned matter.[1] As amplified below, AMNEX submits that the Commission does not have the legal authority to adopt its proposed rate disclosure requirement. At most, the FCC, provided it has made the requisite review of operator services provider ("OSP") rates, can require the disclosure of information how a user of operator services can obtain rates on the call the user intends to make. However, AMNEX submits that such a requirement, if it is imposed at all, should only be imposed on all OSPs or, in the alternative, only on those OSPs whose rates exceed the CompTel Coalition rate ceiling submitted earlier in this proceeding.

I. STATEMENT OF INTEREST

AMNEX is a provider of operator services to locations throughout the country. The Commission's price disclosure requirement proposal in the *SFNPRM* could impose additional regulatory requirements and costs on AMNEX, and adversely affect its business. Accordingly, AMNEX has a vital interest in the outcome of this proceeding.

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[1] FCC 96-253, 61 Fed. Reg. 30,581 (June 16, 1996) ("SFNPRM").

II. THE COMMISSION LACKS AUTHORITY TO ADOPT THE PROPOSED DISCLOSURE REQUIREMENTS

In the *SFNPRM*, the Commission tentatively, and wisely, determined to abandon its costly billed party preference proposal in lieu of other alternatives designed to advance the objective of allowing consumers to make informed choices in making operator services calls. One such alternative is the imposition of rate disclosure requirements on some or all 0+ calls.[2] The SFNPRM outlines two pre-call-connection disclosure proposals: (1) the disclosure by *every OSP* of prices *for each call* or of a representative call and (2) the disclosure of the charges for the initial and subsequent periods by OSPs whose rates exceed an FCC-established benchmark.[3] The Commission tentatively concluded that it should adopt the latter approach. The agency also concluded that the benchmark should be set at the weighted "average" of the operator services rates charged by AT&T, MCI, and Sprint, the three largest OSPs, plus a certain percentage, such as 15 percent.[4]

As explained below, the FCC's disclosure proposals have no legal basis. The benchmark-related proposal in the *SFNPRM* is inconsistent with FCC's ratemaking authority. In addition, both disclosure proposals (all OSPs or only those OSPs that exceed the benchmark) exceed the Commission's authority under the Telephone Operator Consumer Services Improvement Act of 1990. If the FCC nevertheless chooses to impose a disclosure requirement based upon a benchmark approach, it should limit it to an announcement to the caller that the OSP's rates are available upon request and should apply it to all OSPs or, in the alternative, to those OSPs with rates that exceed the benchmark proposed by the CompTel Coalition.

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[2] *SFNPRM* ¶ 14.

[3] *Id.* ¶ 37.

[4] *Id.* ¶¶ 28, 35. For purposes of these comments, the percentage will be assumed at 15 percent.

A. The Benchmark-Related Price Disclosure Requirement Would Contravene the FCC's Ratemaking Authority

While the Commission has the authority to engage in industry-wide ratemaking authority through a benchmark approach,[5] it must do so according to ratemaking principles. Chief among these is that the Commission cannot prescribe a rate in the absence of evidence supporting the rate chosen as just and reasonable.[6] The adoption of a benchmark rate as proposed in the *SFNPRM* constitutes ratemaking. Unless an OSP's rates are at or below the benchmark, the proposed regulatory framework would impose additional regulatory obligations on the OSP, along with the associated expenses. However, the FCC's proposal fails to comply with its ratemaking authority on several counts.

First, the benchmark does not apply equally to all OSPs. In particular, three OSPs -- AT&T, MCI and Sprint -- by definition would be excluded, absent a precipitous increase in their own rates. The effective exclusion of these OSPs -- whose rates, although legal, have not been found to be just and reasonable -- would constitute a violation of the Equal Protection Clause of the United States Constitution.

The *SFNPRM*, in apparent recognition of the fact that the price disclosure benchmark is not supported by any direct evidence that rates above the proposed benchmark are not just and reasonable, suggests that the benchmark should reflect the consumer's willingness to pay.[7] The *SFNPRM* concludes that a benchmark based on a percentage of the average weighted AT&T/MCI/Sprint rates would provide an indication of the level above which consumers are not willing to pay.

Apart from the factual dubiousness of this assertion,[8] the reliance on consumer

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[5] *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968).

[6] 47 U.S.C. § 205(a); *AT&T v. FCC*, 449 F.2d 439, 450-51 (2d Cir. 1971).

[7] *SFNPRM* ¶ 23.

[8] Callers when away from home have numerous calling options for which the rates vary tremendously and for which they have historically shown a willingness to pay. As CompTel (continued...)

willingness to pay in order to justify a ratemaking prescription is without precedent. To the contrary, the Commission's inquiry into whether costs are just and reasonable has always focused on the service provider's costs of offering service.[9] The rates consumers are willing to pay have never been relevant to a determination to reasonableness. At most, willingness to pay may dictate which competitors survive in the marketplace. The Commission's benchmark-related proposal is not based upon an inquiry into the costs of providing operator services, either those of the three OSPs upon whose rates the benchmark would be based nor those of other OSPs which would be subject to the benchmark.[10] Absent such an investigation, the Commission cannot justify its proposed benchmark as just and reasonable.

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[8](...continued)
showed in an *ex parte* submitted earlier in this proceeding, hotels charge rates for long-distance calls that would be far in excess of the proposed benchmark. Cellular calls are also typically in excess of the benchmark proposal. *Ex parte* presentation of the Competitive Telecommunications Association, CC Docket No. 92-77, dated June 22, 1995. By the same token, the FCC's own reports indicate that more consumers have complaints about the largest OSP of all -- AT&T -- than any other service provider. Common Carrier Bureau, "Common Carrier Scorecard," Fall 1995, Appendix. While AT&T carries the most traffic, this number of complaints suggests that many persons simply are unaware of the high rates for operator services in general as compared to those for direct dialed 1+ calls. Accordingly, customer willingness to pay is a fickle matter and certainly not a sound basis upon which to base a ratemaking.

[9] *See, e.g., United Telecommunications, Inc.*, 9 F.C.C. Rcd 2013, 2013-14 (1994) (analysis of reasonableness of United's interconnection rates is a three-step process examining direct investment, direct costs, and overhead expenses).

[10] Tellingly, the FCC concedes that the costs of smaller OSPs, such as AMNEX, may exceed those of AT&T, MCI and Sprint because of economies of scale and/or the provision of superior services, to name two examples. *SFNPRM*, ¶¶ 24, 36. Moreover, it is noteworthy that the largest OSP, AT&T, has raised rates substantially in the recent past. A few examples illustrate the point. Since November 1994, when the CompTel Coalition submitted its rate ceiling proposal, AT&T has increased its set-up rates for automated calling card calls by 25 percent, its first-minute day rates from a range (based on mileage) of $0.21-0.34 to $0.33-0.45, the set-up rates for billed-to-third-party-number calls by over 10 percent, and its set-up rates for person-to-person calls by over 25 percent.

B. The Disclosure Proposals Exceed the Authority Imposed in TOCSIA

In addition to the lack of evidence that the benchmark is a just and reasonable rate ceiling before additional price disclosure obligations are triggered, the disclosure proposal in the *SFNPRM* exceeds the authority granted to the FCC by Congress. In the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"),[11] Congress charged the Commission with establishing a regulatory framework governing the provision of operator services. TOCSIA imposed a number of requirements -- *e.g.*, branding, the filing of informational tariffs -- and directed the FCC to conduct a rulemaking to protect consumers from potential unfair and deceptive OSP practices and to ensure that OSPs "have the opportunity to make informed choices in making [interstate telephone] calls" using operator services.[12] With respect to rate disclosure information, Section 226(b)(1)(C) of the Communications Act of 1934 imposes upon OSPs an obligation to disclose, *upon request*, to users "a quote of its rates or charges for the call." Section 226(h)(2)(B) provides further that

> [i]f the rates and charges filed by any provider of operator services [in its informational tariff] appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to . . . announce that its rates are available on request at the beginning of each call.[13]

In short, TOCSIA expressly delineates the authority the Commission has to impose a pre-connection disclosure requirement and limits that authority to information concerning the *availability* of rates, *not the rates themselves*.

The *SFNPRM* invokes no authority to require disclosures that exceed the requirement contemplated in the statute because there is none. Instead, the *SFNPRM* makes an unfounded leap in logic to state that the proposed disclosure requirement is "consistent with TOCSIA's

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[11] Pub. L. No. 101-435, § 3, 104 Stat. 987, *amended* 101-555, § 4, 104 Stat. 2760 (1990), *codified at* 47 U.S.C. § 226.

[12] 47 U.S.C. § 226(d)(1).

[13] *Id.* § 226(h)(2)(B). *Id.* § 226(b)(1)(C).

directive that we require OSPs to identify themselves,"[14] *i.e.*, the branding requirement of Section 226(b)(1)(A). However, equating the disclosure of rates with the "identification" of the service providers is illogical. The two are completely different, and the differences are underscored by the fact that TOCSIA contains separate provisions governing rate disclosure[15] and carrier identification, *i.e.*, branding, requirements.[16] Moreover, if carrier identification is to be equated with disclosure of rates, then *all* OSPs, including AT&T, MCI and Sprint, must disclose their rates prior to call connection, and the benchmark-related disclosure requirement is indefensible.

Nor do the general provisions governing the Commission's rulemaking authority contained in sections 4(i) and 226(d)(1) of the Act authorize the Commission to adopt its benchmark price disclosure proposal.[17] Instead, the *SFNPRM* proposal extends beyond the price disclosure provisions explicitly provided for in TOCSIA, namely disclosure of rates upon customer request and, when a provider's rates appear "upon review" by the Commission to be unjust and unreasonable, mandatory disclosure that the OSP will make such rate information available upon request. The FCC's proposal is *not* based upon a review of the rates and costs of any OSP that would be subject to the requirement. Rather, as noted above, it is based on the rates of three OSPs that are effectively excluded from the requirement. As the Commission notes several times in the *SFNPRM*, individual OSPs may have higher costs than the three largest OSPs, for example, because they provide superior services or because they are smaller and thus have smaller economies of scale.[18]

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[14] *SFNPRM* ¶ 36.

[15] 47 U.S.C. §§ 226(b)(1)(C), 226(h)(2)(B).

[16] *Id.* §§ 226(b)(1)(A), 226(b)(2).

[17] *See*, 47 U.S.C. § 4(i) (the FCC may make such rules and regulations as may be necessary in the execution of its functions) and § 226(d)(1) (the FCC shall adopt rules to ensure consumers have the opportunity to make informed choices in making operator services calls). *See also SFNPRM* ¶¶ 35-36 nn.93-94.

[18] *SFNPRM* ¶¶ 24, 27

Accordingly, pursuant to the statutory authority explicit in TOCSIA, at least a preliminary review of a particular OSP's rates and operating expenses is necessary before a determination can be made that that OSP's rates are unjust and unreasonable.

In addition, TOCSIA already obligates the OSP to provide rates upon customer request. At most, the only mandatory rate-related disclosure contemplated in the statute is, after a specific finding that an OSP's rates appear to be unjust and unreasonable, a disclosure that a customer may request the rates for the call. Both of the FCC's disclosure proposals go impermissibly beyond this line. The Commission may not, whatever the policy basis, establish a regulatory structure different than the one established by Congress.[19]

Moreover, under well-established principles of statutory construction, TOCSIA cannot be read to authorize the Commission's proposed rate disclosure requirements. One of the central maxims of construction is that a statute is to be interpreted to give each one of its provisions meaning.[20] If the Act's general rulemaking authority already gave the Commission the ability to adopt an automatic rate disclosure requirement, as proposed, there would have been no need for Congress to *permit* the FCC to require service providers, under certain circumstances, to announce to customers prior to commencement of the call that rate information is merely available. Interpreting the general provisions of the Act to give the Commission this broader authority would impermissibly render Section 226(h)(2)(B) superfluous.

The canons of statutory construction also provide that the general language of a statute usually is inapplicable to a matter specifically dealt with elsewhere in the same legislation.[21] Thus, the general rulemaking authority of sections 4(i) and 226(d)(1) are

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[19] *See MCI Telecommunications v. AT&T*, 114 S.Ct. 2223, 2233 (1994).

[20] *Moskal v. United States*, 111 S.Ct 461, 466 (1990); *Reiter v. Sonotone Corp.*, 99 S.Ct 2326, 2331 (1979).

[21] *See, e.g., Morales v. Trans World Airlines, Inc.*, 112 S,ct 2031, 2037 (1992); *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

inapplicable to those situations where Congress has given the FCC specific alternatives from which to choose. In Section 226(h)(2), of course, the Congress provided the FCC with two options where, upon review, a particular OSP's rates appear to be unjust and unreasonable -- one, require the OSP to justify its rates or, two, to announce that its rates are available to the customer at the beginning of each call, consistent with Section 226(b)(1)(C). Because the *SFNPRM*'s proposals are not included within these options, they are not authorized.

III. THE RATE DISCLOSURE PROPOSALS WOULD INCREASE OSPs' COSTS AND DELAY CALL PROCESSING SO AS TO UNDERMINE COMPETITION

In addition to the legal infirmities of the rate disclosure proposals in the *SFNPRM*, the proposals are unsound as a matter of policy. Adoption of the requirement that, before call completion, all OSPs or those whose rates exceed a benchmark disclose the charges a customer will incur would increase the costs associated with operator services calls and impose additional delay in the processing of such calls. Specifically, based on AMNEX's experience, OSPs meet their statutory obligations to provide customers with rate information upon request by having a live operator rate the call the customer proposes to make. The Commission's proposals would require OSPs to rate *all* calls in advance. On automated operator assisted calls, affected OSPs would either have to redirect all calls to a live person the obtain the call information and determine the applicable rates, or to develop an automated real-time rating system. Either approach would add considerable expense and would also significantly delay call processing of operator services calls. If the disclosure requirement applied only to OSPs that exceeded a certain benchmark rate, it would tends to increase the rates of those OSPs relative to the benchmark even further, and undermine those OSPs' ability to compete.[22]

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[22] If the FCC opted for a "lesser" disclosure regulation, such as its alternative proposing the disclosure of its highest or average rate for a seven-minute domestic call, *see SFNPRM* ¶ 35, the disclosure requirement would in many cases only serve to confuse or mislead customers about the rates they actually would be charged. OSPs have many different classes (continued...)

IV. CONCLUSION

In sum, therefore, the FCC lacks the legal authority to adopt its proposal requiring OSPs whose rates exceed a certain benchmark to disclose those rates at the beginning of each call. There is no evidence in the record to conclude that rates in excess of 115 percent are presumptively unjust or unreasonable, so as to justify any additional regulatory requirement, let alone the rate disclosure proposal in the *SFNPRM*. Further, TOCSIA does not authorize that any, or all, OSPs must announce their rates at the beginning of each call when a customer does not request it. If in the final analysis the FCC is intent to adopt a disclosure requirement, however, the only additional disclosure requirement it can impose is one consistent with Section 226(h)(2)(B) concerning the availability of rate information to the customer. If the FCC concludes that such a requirement is necessary, all OSPs should be

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[22](...continued)
of automated and live-operator-assisted calls as well as a variety of rates based on location, the jurisdictional nature of the call, the distance of the call and so forth. Accordingly, these alternative proposals, while they might avoid some of the unwarranted costs associated with a regulation that required the real-time rating of each call, would compel affected OSPs to make commercial speech that was misleading or confusing. Because such speech would not directly advance the FCC's and Congress's objective to allow consumers to make informed choices when making operator services calls, and could even serve instead to frustrate that purpose, such a regulation would contravene the First Amendment protection afforded commercial speech. *See, Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265, 2275, 2278 (1985) (regulation of commercial speech must serve a substantial governmental interest and be tailored to directly advance that interest).

obligated or, in the alternative, only those OSPs with rates exceeding the benchmark proposed by the CompTel Coalition.

Respectfully submitted,

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